



DECISION

Fair Work Act 2009

s.160—Variation of modern award to remove ambiguity or uncertainty or correct error

Family and domestic violence leave review 2021

(AM2021/55)

JUSTICE HATCHER, PRESIDENT
VICE PRESIDENT CATANZARITI
COMMISSIONER SPENCER

SYDNEY, 10 MARCH 2023

Family and domestic violence leave review 2021 – changes to National Employment Standards – passage of Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022 – family and domestic violence leave – s 160 of the Fair Work Act 2009 - variations to remove uncertainty – final determinations issued.

Introduction

[1] On 30 April 2021, the Commission commenced a review of the family and domestic violence leave (FDV leave) provisions in modern awards arising out of the 4 yearly review of modern awards (4 yearly review). In August 2022, following the introduction of the *Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022* into Parliament, the Full Bench issued a Statement advising it did not propose to take further steps in the 2021 FDV review.¹

[2] The *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* (Paid FDV Act) was enacted and received Royal Assent on 9 November 2022. The Paid FDV Act amends the National Employment Standards (NES) in the *Fair Work Act 2009* (FW Act) to replace the existing employee entitlement to five days of unpaid FDV leave with an entitlement to 10 days of paid FDV leave in a 12-month period for full-time, part-time and casual employees.

[3] In a Statement issued on 2 February 2023 (February Statement),² we noted there are 121 modern awards containing a reference to the unpaid NES entitlement, and an additional award which retains a clause inserted during the 4 yearly review providing for five days of unpaid FDV leave.³ These provisions are now inconsistent with the NES. We also identified two further issues relating to the consistency of terms in awards with the new entitlement to paid FDV leave, being two types of terms that have the appearance of excluding certain employees from receiving an entitlement to paid FDV leave:

- (1) Terms that state that the casual loading is paid instead of paid leave entitlements; and

(2) Terms that limit the applicability of award provisions to certain classes of workers.

[4] In our February Statement we set out our *provisional* views as to how to resolve the NES consistency issues identified and published draft determinations giving effect to our *provisional* views. Parties were invited to file submissions in response to the draft determinations by 4:00 pm (AEDT) on Thursday, 23 February 2023.

[5] We received the submissions from the following parties:

- Construction, Forestry, Maritime, Mining and Energy Union – Maritime Union of Australia Division (MUA);⁴
- Australian Council of Trade Unions (ACTU);⁵
- Australian Services Union (ASU);⁶
- Construction, Forestry, Maritime, Mining and Energy Union – Mining and Energy Division (MEU);⁷
- Construction, Forestry, Maritime, Mining and Energy Union – Manufacturing Division (CFMMEU - MD);⁸
- Australian Chamber of Commerce and Industry, Australian Business Industrial and Business NSW (ACCI, ABI and Business NSW);⁹ and
- National Tertiary Education Industry Union (NTEU).¹⁰

[6] The parties raised several concerns with the draft determinations in their submissions. We deal with each of the issues raised by the parties below. We note the ASU, MEU and NTEU provided broad support of the ACTU’s submissions, with the ASU and MEU providing additional submissions in relation to discrete issues which are set out below.

[7] Before turning to the issues raised in the submissions, we note that in our February Statement we contemplated the exercise of power under s 157 of the FW Act to vary the FDV provisions of awards. However, on reflection, we consider the more appropriate source of power to deal with the issues raised is s 160 of the FW Act. Section 160 of the FW Act permits us to make a determination varying a modern award to remove an ambiguity or uncertainty or to correct an error. Each of the issues identified in the February Statement concerns provisions which are inconsistent with the NES. While such terms will have no effect by virtue of s 56 of the FW Act, their inclusion in the awards is confusing and creates uncertainty for readers as to their entitlements or obligations. The proposed variations are intended to remove this uncertainty. Dealing with the matter under s 160 will also avoid the need to consider whether an Expert Panel needs to be constituted to determine the matter in respect of any of the subject awards in accordance with s 617 of the FW Act (as amended by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*).

Other references to family and domestic violence leave

[8] ACCI, ABI and Business NSW filed submissions noting that the following 9 awards contain a definition of the National Employment Standards (NES) with an additional reference to “*unpaid family and domestic violence leave*”:

- *Cleaning Services Award 2020*
- *Clerks—Private Sector Award 2020*

- *Fast Food Industry Award 2020* (Fast Food Award)
- *General Retail Industry Award 2020*
- *Hair and Beauty Industry Award 2020* (Hair and Beauty Award)
- *Hospitality Industry (General) Award 2020*
- *Pharmacy Industry Award 2020*
- *Restaurant Industry Award 2020*
- *Security Services Industry Award 2020*.

[9] ACCI, ABI and Business NSW submitted that, consistent with other changes proposed in the draft determinations, the references to “unpaid” should be removed.¹¹

[10] Each of the above-mentioned awards, with the exception of the Fast Food Award and the Hair and Beauty Award, contain an extract of s 61 of the FW Act under a definition of the NES in clause 2. Each of these extracts refers to “*unpaid family and domestic violence leave*”. The Fast Food Award and the Hair and Beauty Award set out the equivalent information in clause 3 of those awards, titled “*The National Employment Standards and this award*”. These provisions, which replicate the terms of s 61(2) of the FW Act, were inserted as a part of the plain language re-drafting process undertaken in relation to the above awards.

[11] We agree with ACCI, ABI and Business NSW that the reference to “unpaid” should also be removed from the relevant provisions in each of the above awards. As these references to unpaid FDV leave appear in clauses containing extracted provisions of the FW Act, we will replace the reference to “unpaid” with a reference to “paid” FDV leave to accurately reflect the current terms of s 61(2) of the FW Act. We note the inclusion of the word “paid” in these definitional clauses departs from the views we express below in relation to the inclusion of “paid” in FDV leave provisions more broadly. However, we consider its inclusion to be necessary because, as explained, the relevant text replicates the terms of the FW Act.

Family and domestic violence leave clause

[12] The ACTU supported amending modern awards to maintain consistency with the NES and to ensure that any terms do not give rise to a potential misinterpretation that paid FDV leave is not available to casual employees or to certain classes of employees. The ACTU submitted that the making of award variations to this effect is necessary to achieve the modern awards objective.¹²

[13] The ACTU agreed with our *provisional* view to remove the word “unpaid” where it appears in the relevant FDV leave provisions in the 121 awards identified. However, the ACTU submitted that instead of the entitlement being referred to as “*family and domestic violence leave*” it should be referred to as “*paid family and domestic violence leave*”. The ACTU also sought amendments to the existing notes in these clauses, proposing the following variations to the current FDV leave clauses:¹³

XX ~~Unpaid~~ Paid family and domestic violence leave

~~Unpaid~~ Paid family and domestic violence leave is provided for in the NES.

NOTE 1: Information provided to employers concerning an employee's experience of family and domestic violence is sensitive and if mishandled can have adverse consequences for the employee. ~~Employers should consult with such employees regarding the handling of this information~~ Employers are subject to confidentiality requirements regarding the handling of this information under s 106C of the Fair Work Act (2009) (Cth) and requirements as to what can be reported on payslips pursuant to Regs 3.47 and 3.48 of the Fair Work Regulations 2009.

NOTE 2: Depending upon the circumstances, evidence that would satisfy a reasonable person of the employee's need to take family and domestic violence leave may include a document issued by the police service, a court or family violence support service, or a statutory declaration.

NOTE 3: For employees in small businesses (employers with less than 15 employees), the entitlement to paid family and domestic violence leave comes into effect on 1 August 2023. Until that date, they have an entitlement to 5 days unpaid family and domestic violence leave.

[14] The ACTU noted that including the word "paid" would make the name of the entitlement in awards consistent with the name of the entitlement in the FW Act. The ACTU submitted there is significant merit to this, noting that it is consistent with the modern awards objective which refers to the need for a simple, easy to understand and stable modern award system. The ACTU also submitted it would minimise confusion about whether the entitlement is paid or unpaid.¹⁴

[15] The ACTU's proposed drafting includes a new "note 3" addressing the date on which the paid leave entitlement commences for employees of small businesses. The ACTU stated that the purpose of the note is to reduce potential confusion amongst award users by clarifying that prior to 1 August 2023 the unpaid entitlement continues to apply to employees of small businesses.¹⁵

[16] The ACTU's proposed drafting also replaces the instruction in note 1 that employers should consult with employees about the handling of their information with a reference to an employer's obligations under s 106C of the FW Act and regs 3.47 and 3.48 of the *Fair Work Regulations 2009* (Cth) (Regulations). The ACTU submitted that the current wording is only very general and needs updating to reflect the relevant legal obligations. The ACTU further submitted that, in the interests of consistency, and given the serious consequences that may result for an employee if an employer fails to comply with these obligations, specific reference to the obligations in the FW Act and Regulations should be included in the clause. The ACTU further commented that failure of employers to comply with these obligations could dissuade employees from accessing the FDV leave.¹⁶

[17] The CFMMEU – MD supported the ACTU's submissions on this issue, further commenting that the emphasis on making express in award terms that the FDV leave entitlement is a paid NES entitlement is critical to ensuring both employers and employees are aware of and understand their rights and obligations.¹⁷

[18] We confirm our *provisional* view at paragraph [10] of the February Statement to remove the word “unpaid” where it appears in the relevant FDV provisions in the 121 modern awards identified.

[19] We reject the ACTU’s proposal to include the word “paid” in all of the references to FDV leave in the awards. While this would reflect the drafting of the FW Act, we do not believe it is necessary for the awards to do so. The relevant provisions simply state that FDV leave is provided for in the NES and readers are directed to refer to the FW Act for further information about FDV leave including who is entitled to the leave and for how many days. Omitting “paid” also maintains consistency with other similar provisions in modern awards concerning leave entitlements which are paid, such as those in relation to personal/carer’s leave.

[20] We also reject the ACTU’s proposal to insert note 3 to set out the date on which a paid FDV leave entitlement commences for small business employees. The information as to who is entitled to *paid* FDV leave and from when can readily be gleaned from the FW Act as well as various sources of information explaining the FDV NES provisions (such as the Commission’s own website). We are disinclined to place a provision in awards which will have to be deleted in a relatively short time where it is not necessary to do so.

[21] We agree with the ACTU’s comments in relation to amending note 1 and will make the amendments proposed.

Casual loading provisions

[22] The ACTU agreed that the casual loading provisions in the 16 identified awards, which state that casual loading is paid instead of entitlements to paid leave, raise the potential for misinterpretation as to whether the paid FDV leave entitlement extends to casual employees. The ACTU agreed with the *provisional* view to remove the offending wording and to include a note for clarity into each of the 16 awards identified.¹⁸

[23] The ACTU submitted that the note proposed in the February Statement should include two additional sentences to make explicit reference to the fact that casuals have the benefit of some NES entitlements, and that, for example, casual employees are entitled to paid FDV leave. To this effect, the ACTU proposed the following note be inserted into the identified awards (with the exception of the *Black Coal Mining Industry Award 2020* (Black Coal Award)):¹⁹

NOTE: The casual loading is payable instead of entitlements from which casuals are excluded by the terms of this award and the NES. See Part 2-2 of the Act. Casuals have the benefit of some entitlements under the NES. For example, casuals are entitled to paid family and domestic violence leave.

[24] The ACTU submitted the inclusion of the additional sentences is warranted for the avoidance of doubt and to ensure that employers and employees are aware that the entitlement to paid FDV leave is available to casual employees, particularly given casual employees are generally not entitled to paid forms of leave.²⁰

[25] The CFMMEU – MD, while noting it does not have an interest in any of the modern awards identified, gave in-principle support to the ACTU’s proposal as an appropriate response

to the casual employment terms in awards and their intersection with FDV leave entitlements in the NES.²¹ The MEU also supported the submissions of the ACTU in relation to the casual loading issue, and provided additional supplementary submissions in relation to the Black Coal Award which we deal with below.

[26] We confirm our *provisional* view to remove the problematic wording and include the note proposed at paragraph [16] of our February Statement in the identified awards (except for the Black Coal Award which we deal with below). We reject the ACTU's proposed alterations. The note is being inserted to replace wording that indicates casuals are excluded from the FDV leave entitlement and we do not consider it necessary to include the additional sentences to make explicit that casual employees have some entitlements under the NES.

Black Coal Award

[27] The MEU submitted that the proposed deletion of clause 11.2(b) of the Black Coal Award goes beyond the scope of the family and domestic violence leave review by expanding the matters that the casual loading is expressed to be in compensation for to include all aspects of the NES from which casuals are currently excluded. It submitted this would result in a substantial change to the Black Coal Award without proper consideration being given to the modern awards objective.²²

[28] To avoid such unintentional expansion, the MEU submitted the relevant amendments should refer only to the relevant leave components of the Black Coal Award, and not extend to other NES provisions. The MEU proposed the following alternative note be inserted:²³

NOTE: The casual loading is payable instead of annual leave, personal/carer's leave and paid community service leave entitlements under this award.

[29] The ACTU also submitted that the proposed drafting in the determination to vary the Black Coal Award constitutes a substantial change that is inappropriate to make as part of the Family and domestic violence leave review.²⁴ The ACTU supported the submissions and variation proposal by the MEU.²⁵

[30] Given the current wording of clause 11.2(b) of the Black Coal Award, we agree that the proposed note unnecessarily expands the matters that the casual loading is expressed to be in compensation for in that award. The determination for the Black Coal Award will be amended to instead include the note proposed by the MEU.

Terms that limit applicability of award provisions

Business Equipment Award 2020

[31] The ACTU supported our *provisional* view that the *Business Equipment Award 2020* should be varied to include the family and domestic violence leave entitlement in the list of provisions from which clerical stream employees in receipt of a certain salary are not excepted. However, it submitted the draft determination refers to the wrong clause, that is, clause 16.1, instead of clause 16.2. The ACTU submitted clause 16.2 should be varied to include reference to clause 27—Paid family and domestic violence leave.²⁶

[32] We agree the incorrect clause has been identified and will amend the draft determination accordingly. Consistent with our *provisional* view at paragraph [18] of the February Statement, clause 16.2 of the *Business Equipment Award 2020* will be amended to include a reference to clause 27—Family and domestic violence leave. We note that consistent with our decision at paragraph [19] above, the word “paid” will not appear in the clause title.

Timber Industry Award 2020

[33] The CFMMEU – MD supported our *provisional* views as being necessary to address the position of pieceworkers and to expressly ensure their access to paid FDV leave under the *Timber Industry Award 2020* (Timber Award). However, it submitted that all references to “unpaid” FDV leave should be varied to read “paid” FDV leave.²⁷ The ACTU also supported varying clause 13.4 of the Timber Award in the manner set out in the draft determination, except that the FDV leave clause should be titled “*Paid family and domestic violence leave*”.²⁸

[34] We confirm our *provisional* view at paragraph [19] of the February Statement to amend clause 13.4 of the *Timber Award* to include clause 32—Family and domestic violence leave. We note that consistent with our decision at paragraph [19] above, the word “Paid” will not appear in the clause title.

Seagoing Award

[35] The MUA stated that, except for the *Seagoing Industry Award 2020* (Seagoing Award), the draft determinations for the awards it has an interest in are acceptable.

[36] The MUA submitted²⁹ in relation to the Seagoing Award that the draft determination proposed inserting a new clause 8.4 stating that clause 8.3 “does not operate to exclude any terms of the NES from applying to vessels granted a temporary licence” whereas at paragraph [24] of our February Statement we proposed inserting a note in equivalent terms. The MUA submitted that its preference is for a note be inserted into the award in the same terms as we proposed in our Statement.³⁰

[37] The ACTU supported adding a note to clause 8.3 to make it clear that clause 8.3 does not operate to exclude any NES entitlements. It submitted that the draft determination should be amended so that the variation takes the form of a note rather than as a new clause 8.4. The ACTU supported the submissions of the MUA regarding the Seagoing Award.³¹

[38] We agree that it is preferable to insert a note into the Seagoing Award in the terms specified and will update the draft determination accordingly. Consistent with our *provisional* view at paragraph [24] of the February Statement, a note will be inserted at clause 8.3 to clarify that the clause “does not operate to exclude any terms of the NES from applying to vessels granted a temporary licence”.

State reference public sector awards

Australian Government Award

[39] The ACTU supported the *provisional* view that the model term in the *Australian Government Industry Award 2016* (Australian Government Award) should be replaced with a reference to the NES, however noted that the reference to the NES should be in the terms proposed in its submission.³²

[40] We confirm our *provisional* view at paragraph [10] of the February Statement to remove the word “unpaid” from the FDV leave clause in the *Australian Government Award*. We note that consistent with our decision at paragraph [19] above, the word “paid” will not appear in the clause title.

Victorian Local Government Award and Victorian State Government Agencies Award

[41] In its submissions, the ASU noted that the *Victorian Local Government Award 2015* (Victorian Local Government Award) and the *Victorian State Government Agencies Award 2015* (Victorian State Government Agencies Award) do not include any references to paid FDV leave and include casual employment terms which appear to exclude the NES. The ACTU noted that these awards are State reference public sector awards and were not subject to the 4 yearly review of modern awards and, consequently, have not been included in the FDV leave proceedings to date.³³ The ASU submitted that it supports amending the Victorian Local Government Award and Victorian State Government Agencies Award to include references to paid FDV violence leave and to remove terms which contravene the NES.³⁴

[42] We reject the ASU’s proposal. State reference public sector awards, with the unique exception of the Australian Government Award, have not been included in the FDV leave proceedings to date and have therefore do not form part of this process.

Final determinations

[43] The draft determinations will be updated in accordance with paragraphs [11], [21], [30], [32] and [38] of this decision.

[44] Final determinations will be published in conjunction with this decision and will take effect on 15 March 2023.



PRESIDENT

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¹ [\[2022\] FWCFB 152](#)

² [2023] FWCFB 24

³ *Australian Government Industry Award 2016*

⁴ MUA submission, 7 February 2023

⁵ ACTU submission, 23 February 2023

⁶ ASU submission, 23 February 2023

⁷ MEU submission, 23 February 2023

⁸ CFMMEU – MD submission, 23 February 2023

⁹ ACCI and ors submission, 23 February 2023

¹⁰ NTEU submission, 24 February 2023

¹¹ ACCI, ABI and Business NSW submission, 23 February 2023

¹² ACTU submission, 23 February 2023 at [14]

¹³ *Ibid* at [23]

¹⁴ *Ibid* at [17]-[19]

¹⁵ *Ibid* at [20]

¹⁶ *Ibid* at [21]-[22]

¹⁷ CFMMEU – MD submission, 23 February 2023 at [9]

¹⁸ ACTU submission, 23 February 2023 at [25]

¹⁹ *Ibid* at [27]

²⁰ *Ibid* at [26]

²¹ CFMMEU – MD submission, 23 February 2023 at [10]

²² MEU submission, 23 February 2023 at [9]

²³ *Ibid* at [10]

²⁴ ACTU submission, 23 February 2023 at [28]-[29]

²⁵ *Ibid* at [30]

²⁶ *Ibid* at [32]-[34]

²⁷ CFMMEU – MD submission, 23 February 2023 at [11]-[13]

²⁸ ACTU submission, 23 February 2023 at [35]-[37]

²⁹ MUA submission, 7 February 2023

³⁰ *Ibid*

³¹ ACTU submission, 23 February 2023 at [38]-[39]

³² ACTU submission, 23 February 2023 at [24]; ASU submission, 23 February 2023; NTEU submission, 24 February 2023

³³ ASU submission, 23 February 2023

³⁴ *Ibid*